No. 83-300

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, PETITIONER

v.

NATIONAL AUDUBON SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

PETER R. STEENLAND
MYLES E. FLINT
NANCY J. HUTZEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

Respondent National Audubon Society commenced this litigation in California Superior Court seeking to limit or enjoin diversions of water from the Mono Lake basin being made by petitioner under the color of state water rights. After removal to the United States District Court for the Eastern District of California, the district court decided that it should abstain from further proceedings pending resolution in the state court of novel questions of state law presented. Pursuant to the district court's direction, respondent Audubon filed an action for a declaratory judgment in the superior court seeking a ruling on those issues. Petitioner now seeks review of the ensuing decision of the California Supreme Court holding that the state Water Board or a court of competent jurisdiction may reconsider previously recognized water rights to determine whether they should be modified in light of environmental values embodied in the "public trust doctrine" recognized by that court. The questions presented in this Court are:

1. Whether the California Supreme Court's decision rests upon the misapprehension that *Illinois Central R. R. v. Illinois*, 146 U.S. 387 (1892), creates a rule of federal law binding upon state courts; and

2. Whether the decision of the California Supreme Court effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-300

CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, PETITIONER

v.

NATIONAL AUDUBON SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. A1-A56) is reported at 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346.[1] The opinion and order of the superior court (Pet. App. A77-A82) are unreported. The abstention order of the United States District Court (Pet. App. A64-A76) and an amendatory order (Pet. App. A59-A63) are unreported.

JURISDICTION

The judgment of the California Supreme Court was entered on February 17, 1983. A petition for rehearing was denied on April 14, 1983. On June 27, 1983, Justice Rehnquist extended the time for filing the petition for writ of certiorari to and including August 22, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

[1]Modifications to the court's original opinion are reproduced at Pet. App. A57-A58.

STATEMENT

1. In May 1979, respondent National Audubon Society and several affiliated organizations and individuals (hereafter collectively "Audubon") filed an action against petitioner in the Superior Court for Mono County, California, seeking to limit the latter's diversions of water from the Mono Lake basin. The complaint alleged, inter alia, that the "public trust doctrine" recognized by California courts protects instream water uses (*e.g.*, fishing, wildlife habitat preservation, and navigation needs) from impairment by more conventional out-of-stream consumptive uses. Following a change of venue from Mono County to Alpine County, petitioner filed a cross-complaint against the United States, the State of California, and all other water users in the basin, seeking a general adjudication of water rights.[2] Upon motion of the United States, the action was removed to federal district court in February 1980.[3] Petitioner twice moved to remand the case to state court; each time that motion was denied by the district court. The

---

[2]Audubon's initial complaint rested entirely on state law grounds. In addition to the public trust doctrine, Audubon alleged violations of various provisions of the California Constitution, and stated claims for public and private nuisance, and to quiet title. Petitioner's cross-complaint also rested on state grounds but, in addition, invoked the provisions of the McCarran Amendment, 43 U.S.C. 666, allowing joinder of all necessary parties, including the United States, in comprehensive water adjudications. The briefs filed by the State of California and the United States upon joinder pursuant to petitioner's cross-complaint also appear to have rested entirely on state law grounds. Audubon subsequently amended its complaint to add a federal common law nuisance claim. The district court is currently considering motions for partial summary judgment that could dispose of the federal common law nuisance claim and for remand of the remaining claims to the superior court.

[3]The petition for removal was based upon the presence of claims affecting federal land titles, and petitioner's claim that the United States had "waived" its "navigation trust" rights affecting Mono Lake.

district court concluded, however, that because the case "raise[d] novel and difficult issues of state law which bear on substantial public policy problems" (Pet. App. A72; see also Pet. App. A70-A71), it should abstain from determining "the interrelationship of the public trust doctrine and the state water rights system" (Pet. App. A75).

Accordingly, the district court judge stayed the federal court action and directed Audubon to seek resolution of the following specific questions of state law by filing an action for declaratory relief in state court (Pet. App. A61):

> 1. What is the interrelationship of the public trust doctrine and the California water rights system, in the context of the right of the Los Angeles Department of Water and Power ("Department") to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? In other words, is the public trust doctrine in this context subsumed in the California water rights system, or does it function independently of that system? Stated differently, can the plaintiff challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiff challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or beneficial" as required under the California water rights system?
>
> 2. Do the exhaustion principles applied in the water rights context apply to plaintiff's action pending in the United States District Court for the Eastern District of California?

The district court explained that the federal claim raised by Audubon (see page 2 note 2, *supra*) would be addressed "if necessary, following the state court resolution of the public trust issue" (Pet. App. A62). Petitioner's action for a

general adjudication of water rights was likewise stayed. Finally, the district court indicated that "[o]nce a determination is made by the state court regarding the appropriate application of the public trust doctrine," it would proceed to address Audubon's claim that petitioner's diversions should be limited (Pet. App. A62).

2. Pursuant to the district court's order, Audubon filed the present action against petitioner in the Superior Court for Alpine County, seeking a declaration resolving the questions posed by the district court. The State and the United States each intervened in that proceeding. The superior court concluded that the "Public Trust Doctrine does not function independently" of the system of recognized water rights in California, and that Audubon was required to seek any modification of petitioner's existing rights, whether based on the public trust doctrine or more conventional rules of California water law, by exhausting administrative remedies with the state's Water Board (Pet. App. A77-A78).

The California Supreme Court granted review. In that court, Audubon argued that the public trust doctrine operates independently of the conventional water rights regime of the state and accordingly grounds a justiciable cause of action for modification of previously recognized water rights. The state argued that the public trust doctrine was subsumed within California water rights law, and that while the state Water Board has authority under that doctrine to revisit prior water allocation decisions to ensure that they remain in conformity with the public trust, Audubon had failed to exhaust its administrative remedies. The United States argued that the state's body of water rights law was a manifestation of the public trust, but that the trust was spent when the state's appropriative water rights regime was created, and that existing water rights accordingly were not

subject to modification on the basis of public trust considerations.[4] Finally, petitioner argued that the public trust doctrine simply had no application to its water rights.

The California Supreme Court did not accept any of the parties' submissions. A unanimous court recognized the applicability of the public trust doctrine to California water rights insofar as the exercise of those rights affects navigable waterways such as Mono Lake. The court held that the doctrine was neither entirely subsumed within the appropriative water rights system nor entirely independent thereof (Pet. App. A38-A39, A50). The court declared (Pet. App. A50):

> The public trust doctrine and the appropriative water rights system are part of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty upon the state to take such uses into account in allocating water resources.

The court did not decree that public trust considerations necessarily were to take precedence over existing appropriative water uses. Rather, recognizing that "[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values," and that "the economy and population centers of this state have developed in reliance upon appropriated water" (Pet. App. A40; footnote omitted), the court affirmed that the "substantial concerns voiced by Los Angeles — the

---

[4]The United States also argued, in passing, that modification of vested water rights under a public trust theory could in a particular case effect a taking, just as such a modification based upon exercise of police power could have that effect.

city's need for water, its reliance upon [the Water Board's approval of its diversions and] the cost both in terms of money and environmental impact of obtaining" alternative water supplies "must enter into any allocation decision" (Pet. App. A43). The court emphasized that it was permissible for the state to "approve appropriations despite forseeable harm to public trust uses," provided the effect of the appropriations upon public trust values had been considered (Pet. App. A41). The court further explained that its decision did "not dictate any particular allocation of water" (Pet. App. A51), stating, "[w]e hold only" that the interests of the petitioner "do not preclude" reconsideration of prior water allocation decisions of the state's Water Board in light of contemporary needs (Pet. App. A43). Summarizing its decision by answering the question posed by the district court, the California court stated: "We reply that [Audubon] can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin" (Pet. App. A51). Turning to the second question referred by the federal court, the California court held that the courts and the Water Board have concurrent jurisdiction of petitions seeking such reconsideration (Pet. App. A44-A45). Exhaustion of administrative remedies was not required, but the California Supreme Court emphasized the authority of the courts under California law to refer the issues to the Water Board for decision (Pet. App. A45-A50).

ARGUMENT

The decision below represents a significant and unwelcome development in the contours of California water law. The United States fully shares petitioner's concern that the California court's decision creates the potential for disruption of what were justifiably thought to be settled water rights. And the rights of the United States, as the largest holder of water rights in California, may well be affected by

the California Supreme Court decision. Moreover, impairment of existing water rights would have particularly serious consequences in the arid West; even the creation of a cloud upon such rights is onerous in circumstances where, as this Court has recognized, the need for stable, secure and known water rights is critical to the proper use of this scarce resource. See, *e.g.*, *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 13-14. In short, the United States is sympathetic with petitioner's criticism of the decision below, and adheres to the view that, as a matter of state law, the public trust doctrine should not be applied so as to disrupt settled expectations respecting property rights in water. Nevertheless, we are doubtful that the case, in its present posture, presents any federal question that is ripe for review by this Court.

1.a. The conclusion that the California Supreme Court's decision rests entirely on state law is difficult to resist. There is nothing in the opinion below that suggests that the issues decided were regarded as questions of federal law. To the contrary, the court characterized its task of "integrat[ing] * * * the public trust doctrine and the board-administered appropriative rights system" as the delineation of "[t]he water law of California" (Pet. App. A5). Moreover, the opinion of the court below reflects its understanding that the state court proceedings were initiated only "to allow resolution by California courts of two important issues of California law" (Pet. App. A14-A15). The abstention procedure used by the district court was designed to have the effect of certification of questions of state law (see Pet. App. A60-A62). The California court recognized it as such, stating that the basis for abstention was the presentation to the federal court of " 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar' " (Pet. App. A15 n.12, quoting *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976)).

b. Petitioner seeks (Pet. 18-23) to locate a federal question in this case arising from the California Supreme Court's discussion (Pet. App. A24) of *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387 (1892). Petitioner argues that the California court mistakenly viewed *Illinois Central* as creating a rule of "paramount federal law" (Pet. 9) binding upon state courts. But, as petitioner acknowledges (*ibid.*), it has long been settled that the public trust doctrine articulated in *Illinois Central* constituted a rule of state, rather than federal law. *Appleby* v. *City of New York*, 271 U.S. 364, 395 (1926).

Nor is there any basis in the record or the California court's opinion for inferring that the court misapprehended the basis for *Illinois Central* or felt obliged to conform state law to supervening authority of federal law. Compare *Michigan* v. *Long*, No. 82-256 (July 6, 1983), slip op. 7. First, as we have noted, the California court repeatedly characterized the issue as one of state law. These references satisfy the "plain statement" rule of *Michigan* v. *Long*, slip op. 7. Second, courts, even more than Congress, may be presumed to know the law, see *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); the elementary misconception that petitioner hypothesizes should not lightly be attributed to the California court. This is especially so because the notion that federal law would govern state water rights is inherently improbable given this Court's repeated emphasis on the primacy of state law in the area of water rights in all but a few well-defined situations. See *Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), slip op. 16-18; *California* v. *United States*, 438 U.S. 645, 653-670 (1978). Third, the California court's opinion in this case reflects its appreciation that *Illinois Central* does not state a rule of federal law, for the court below described itself as "indors-[ing] the *Illinois Central* principles" in an earlier case (Pet. App. A26); this is scarcely an apt choice of language to

characterize the operation, under the Supremacy Clause, of this Court's decisions on questions of federal law. Fourth, citing *Appleby* v. *City of New York, supra,* the California Supreme Court has expressly recognized that although "the general principle declared [in *Illinois Central*] has been recognized throughout the country," that decision is necessarily a statement of Illinois law." *State* v. *Superior Court of Lake County (Lyon),* 29 Cal. 3d 210, 228 n.16, 625 P.2d 239, 250 n.16 172 Cal. Rptr. 696, 707 n.16, cert. denied, 454 U.S. 865 (1981).[5]

Finally, we note that, in addition to *Illinois Central,* the decision below rests upon a host of state court decisions, including decisions rendered prior to *Illinois Central.* See, *e.g., People* v. *Gold Run Ditch & Mining Co.,* 66 Cal. 138, 4 P. 1152 (1884). In short, it appears that *Illinois Central* represented nothing more than a seminal articulation of the public trust analysis that the California courts have adopted. Its citation cannot convert the decision below into one based on federal law.[6]

2.a. Petitioner contends alternatively (Pet. 23-28) that the mere recognition of the applicability of the public trust doctrine to its previously recognized appropriative water rights effects a taking that is presently ripe for review because it effectuates a "sudden," "startling" change in the terms of state law water rights, rendering insecure

---

[5] *Lyon* in turn is cited in the opinion below (see Pet. App. A21).

[6] In addition to *Illinois Central,* the court below referenced the Institutes of Justinian (Pet. App. A18), Spanish and Mexican law (Pet. App. A18 n.15), and the English common law (Pet. App. A20). Plainly these references reflect their analytical or historical relevance, and do not betoken any view that Roman or Spanish law bound the California court. There is no more reason to think that the citation of *Illinois Central* reflects an analogous misconception. At bottom, petitioner's contention (Pet. 9 n.3, 14-17) is that the decision below so radically misinterprets California law that it should be deemed ultra vires, and thus not based on state law.

previously indefeasible titles. We are not so persuaded. We do adhere to the view noted below (see page 5 note 4, *supra*) that the application of public trust principles to limit previously recognized water rights may in some circumstances effect a taking. And we further agree that a drastic systematic redefinition of property rights may in some circumstances be ripe for judicial review under the Fifth and Fourteenth Amendments before its application to particular property rights has been fully determined. But in our judgment no taking claim is ripe for review at this time in this case.[7]

As our account of the California Supreme Court's decision should make clear (see pages 5-6, *supra*), it is far from certain that petitioner will in fact suffer any diminution of its rights to divert water from the Mono Basin. Rather, the competent authority — which may yet turn out to be the district court, the superior court, or the state Water Board —must engage in the analysis mandated by the court below. As that court recognized, it may yet be determined that "the needs of Los Angeles outweigh the needs of the Mono Basin, [and] that the benefit gained is worth the price" (Pet. App. A42). Moreover, separate and apart from this state law analysis, we believe that further proceedings must address the question whether a particular diminution

---

[7]We note that there is some question whether petitioner may complain in this Court of a taking effected by state action. As petitioner acknowledges (Pet. 26 n.9), a municipality ordinarily may not raise such a challenge. *Coleman* v. *Miller*, 307 U.S. 433, 441 (1939); *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *City of Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923). It is difficult to see why the fact that the alleged taking stems directly from judicial action that is based on the state's assertion, reflected in its Constitution and statutes, of title to waters within its boundaries should alter that rule. Any error that petitioner discerns in the state court's articulation of state water law does not make the pronouncement of the state court any less the law of the state, subject, of course, to legislative correction.

in water rights actually effects a taking of vested rights — a question impossible to answer in the abstract, or without consideration of any compensating adjustments in petitioner's water rights that might be decreed. Given the overriding uncertainty that presently exists as to the actual impact of the decision below upon the rights held by petitioner, it would be difficult, indeed meaningfully, to assess the taking claim. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 636 (1981) (Rehnquist, J., concurring).[8]

The Court has typically awaited actual application of a new legal regime that affects existing property rights and the development of a concrete factual record for adjudication before undertaking to determine analogous taking claims. For instance, in upholding the then novel institution of municipal zoning in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395-397 (1926), the Court declined to anticipate the possible application of the ordinance to particular cases, noting the absence of the necessary factual record, the inappropriateness of ascertaining the impact of the ordinance by "mere speculation," and the "embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue" (*id.* at 397). Yet the claim in *Euclid*, as here, was that the "mere existence and threatened enforcement of the ordinance [or doctrine] * * * materially and adversely affect[s]" the value of the rights subject thereto (*id.* at 395). See also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 & n.3, 595-596 (1962).

---

[8]Review at this juncture might also tend to frustrate the State's prerogative to choose — through its courts — whether to tailor its public trust doctrine to avoid taking of particular water rights or to pay compensation in the event of a taking. See *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. at 658-660 (Brennan, J., dissenting); *id.* at 633-634 (Rehnquist, J., concurring, "agreeing with much of what is said in the dissenting opinion").

In other contexts, as well, the Court has eschewed determination of a taking issue where further proceedings are needed to determine whether there is actually an impairment of rights, see, *e.g., Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981).[9] Although particularly suited to the taking question, which cannot be decided without regard to all pertinent circumstances (see *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978)), these principles have also guided the Court in other forms of constitutional adjudication. See, *e.g., Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 10. Because this Court cannot know whether state law will ever actually require diminution in existing diversions, "judicial consideration * * * should await further developments" (*ibid.*; footnote omitted). See also *Minnick* v. *California Department of Corrections*, 452 U.S. 105, 120-127 (1981).

b. Petitioner's reliance (Pet. 24-27) on Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967), is misplaced. The state court ruling in *Hughes* that Justice Stewart would have disapproved even if the matter were within the ambit of state law, had the immediate effect of depriving the petitioner of title to the accreted lands in question. No further proceedings were

---

[9]Plainly the substitution, upheld in *Dames & Moore*, of the right to proceed in the Iran-United States Claims Tribunal for the private claims pending in United States courts that were settled by the President deprived those claimants of an element of certainty and security they previously possessed. Yet, although the Court declined to be "overly sanguine about the chances of United States claimants before the Claims Tribunal," the Court declined to decide whether the suspension of claims itself effected a taking. 453 U.S. at 687, 688 & n.14.

needed in *Hughes* to ascertain whether or to what extent the state court ruling would affect the petitioner's interest.[10]

3. Several prudential considerations also counsel against further review in this case. It does not appear that petitioner or any other party argued below that the mere possibility of reconsideration of previously recognized appropriative water rights in light of public trust considerations would effect a taking. And nothing in the California court's opinion addresses such a claim.[11] Accordingly, consideration of petitioner's across-the-board taking theory is inappropriate in this case. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 2-9.

Although we share petitioner's disppointment concerning the decision below, we must also recognize that the decision arises in an area that has traditionally been primarily the province of state law. Just as Congress has traditionally deferred to state water law in a wide variety of situations, *California* v. *United States*, 438 U.S. at 653, under

---

[10]Other cases cited by petitioner (Pet. 28) are inapposite. Most rest upon the Contract Clause (Art. I, § 10, Cl. 1) of the Constitution, which proscribes the making of any "Law impairing the Obligation of Contracts;" claims under the Contract Clause therefore may be ripe for adjudication at an earlier juncture than taking claims. No Contract Clause claim is raised in this case. *Sotomura* v. *County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978), addresses legislative action having an immediate effect on property interests and therefore is distinguishable.

[11]The court's occasional references to the "vested" or nonvested character of California water rights to which petitioner points (Pet. 10 n.5) does not reflect any consideration of the taking theory now advanced by petitioner. It may well be that the California court adheres to a view of the public trust that precludes a finding of a taking in a particular case, even if previously recognized water rights are substantially impaired (see Pet. App. A29 n.22). But no such question is ripe for review on the record of this case.

principles of comity and federalism it appears appropriate — absent a clearly delineated violation of federal rights —for the federal judiciary to defer to the courts of California on questions of water law that affect only California water users. Accordingly, notwithstanding our own considerable misgivings about the decision below, we conclude that any improper impairment of settled expectations respecting water rights that might result from further proceedings under the standards announced in this case may best be redressed when and if it occurs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

PETER R. STEENLAND
MYLES E. FLINT
NANCY J. HUTZEL
Attorneys

OCTOBER 1983

DOJ-1983-10